CF0000063242

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR, M.P.

Criminal Appeal No. 973 of 2000.

APPELLANTS: (In Jail)

1. Shivlal S/o Girdhari, aged 62 years
2. Hemkumar S/o Shivlal, aged 36 years,
3. Brajlal S/o Girdhari, aged 45 years,
4. Ashiwani S/o Brajlal, aged 26 years,
5. Sukhsagar S/o Shivlal, aged 42 yrs,
6. Aasan S/o Brajlal, aged 22 years.

All resident of village Dhara, P
Bemetara, Distt. Durg, M.P.

3414

Filed on ... by Shri ... Advocate

PRAD

VERSUS

RESPONDENT:- State of M.P.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

(54)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 973 of 2000

Shivlal and others

Versus

The State of M.P.

JUDGMENT FOR CONSIDERATION

Sd/-
Dhirendra Mishra
Judge

HON'BLE SHRI JUSTICE SATISH K. AGNIHOTRI

Sd/-
Satish K. Agnihotri
Judge

POST FOR JUDGMENT ON 25 AUGUST 2006

Sd/-
Dhirendra Mishra
Judge

(55)

HIGH COURT OF CHHATTISGARH AT BILASPUR

CORAM : HON'BLE SHRI DHIRENDRA MISHRA, & HON'BLE SHRI SATISH AGNIHOTRI, JJ.

CRIMINAL APPEAL NO. 973 OF 2000

Appellants : Shivlal and others

(In Jail)

versus

Respondent : The State of M.P.

Present : Shri S.C.Verma, counsel for the appellants.
Shri Akhil Mishra, Panel Lawyer for the respondent/State.

J U D G M E N T
(Delivered on 25 of August, 2006)

Per Dhirendra Mishra, J. :

The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 31st March 2000 passed by learned Additional Sessions Judge, Bemetara, Durg in Sessions Trial No.147/99, by which all of them have been convicted under Section 148 of the Indian Penal Code and sentenced to undergo R.I. for two years and pay a fine of Rs.200/-, in default of payment of fine to further undergo R.I. for one month. Appellant Sukhsagar has been convicted under section 302 of the IPC and rest of the appellants have been convicted under section 302 with the aid of section 149 of the IPC and sentenced to undergo imprisonment for life and pay a fine of Rs. 500/- each, in default of payment of fine to further undergo RI for two months. All the sentences have been directed to run concurrently.

2. Case of the prosecution in brief is that on 12.10.1997 at about 16.30 hours the appellants along with nine other accused persons armed with weapons with a common object of murdering Shankar Satnami attacked him near the house of Tijwa Sahu when the deceased was proceeding towards a tank along with his wife Sukhbai and his grand-son, as a result of which he sustained numerous injuries and died on the spot.

3. After conducting inquest body of the deceased was sent for autopsy to Government Hospital Bemetra where Dr. K.L. Dhruv conducted the post mortem and submitted his report of Ex. P-15.

4. Ramkhilawan PW-7 gave oral information of the incident on 12.10.1997 at about 14.15 hours in Bemetra police station to the effect that arson took place in his village and Shankar had died. After recording the information in the daily diary SI Mr. J.S. Dhurve along with armed force proceeded for village Dara. Thereafter, Dehati Nalsi of Ex. P-1 was recorded on the information of Beer Singh PW-1 at 16.30 hours on the same day. On his information Dehati merg of Ex. P-3 and merg of Ex. P-2 regarding death of Shankar Satnami was recorded on the basis of which Crime No.236/1997 was registered on 12.10.1997 against 13 persons under sections 147, 148, 149 and 302 of the IPC. Inquest was performed over the body of the deceased vide Ex. P-6 after due notice to the witnesses in their presence. Site plan as per Ex. P-6 was prepared by SI Mr. J.S. Dhurve. Site plan of Ex. P-13-A was prepared by Halka Patwari Tuganram Sahu. In pursuance of the memorandum of Ex. P-14 of accused Shivlal blood stained Tabbal, in pursuance of memorandum of Hemkumar blood stained bamboo, in pursuance of accused Brijlal blood stained club, in pursuance of memorandum of accused Ashwani blood stained club, in pursuance of memorandum of accused

Aashan club and in pursuance of memorandum of accused Sukhsagar blood stained *Barchhi* were seized vide seizure memos of Ex. P-15-A, P-17, P-19, P-21, P-23 and P-25 respectively. Plain soil and blood stained soil was taken into possession from the place of incident vide Ex.P-28. Blood stained underwear, Lungi and pair of slippers and a knife were seized from the spot vide Ex.P-29. The weapons used for commission the offence seized from the accused persons were sent for examination to the doctor who after examining the same opined that the injuries present over the body of the deceased could be caused by the weapons so seized. However, for the purpose of ascertaining the presence of blood stains he advised to send the same for chemical examination. The reports submitted by the doctor in this regard are Ex. P-6, P-7, P-8, P-9, P-10, P-11 and P-12. The seized weapons, plain and blood stained soil was sent chemical examination to Forensic Science Laboratory, Raipur. Forensic Science Laboratory vide report of Ex. P-9 confirmed the presence of blood over all the articles including article A, which was described as plain soil. After completing investigation charge sheet was filed against the appellants and nine other accused persons in the Court of Judicial Magistrate First Class Bemetra who in turn committed the case to the Court of Sessions Judge, Durg from where learned Additional Sessions Judge received the same on transfer for trial. Charges under sections 147, 148 and 302/149 of the IPC were framed against all the accused persons who abjured their guilt.

5. The prosecution in order to establish the charges against the accused persons examined 13 witnesses in all and thereafter statements of the accused persons were recorded under section 313 of the Code of Criminal Procedure in which they denied the circumstances appearing against them in the prosecution case and pleaded their innocence and false implication because of factional

rivalry. However, learned Additional Sessions Judge after hearing the public prosecutor and counsel for the appellants convicted and sentenced the appellants as mentioned above. The other nine accused persons namely Sukhchand, Nandkumar, Beeru, Mehetaru, Bhoklu, Durga, Dwarika, Khoman and Bhuvan were acquitted by giving them benefit of doubt.

6. Homicidal death of deceased Shankar Satnami is not in dispute. Even otherwise from the perusal of the statement of Dr, Dhruv PW-3 who conducted the post mortem and submitted his report of Ex. P-15 in which he found in all 16 injuries on various parts of the body of the deceased described in paragraph 9 of the impugned judgment and opined that the cause of death was shock due to excessive bleeding and extensive injuries on vital organs of body of the deceased, homicidal death of Shankar Satnami is established.

7. Conviction of the appellants is based on the testimony of the sole eyewitness Sukhbai PW-9, the wife of the deceased whose evidence is duly corroborated by medical evidence and also recovery of weapons of the offence which were seized from the accused persons and were found to be blood stained on chemical examination.

8. Learned counsel for the appellants submits that the village is faction ridden as is evident from the prosecution story. The villagers had made complaints against the deceased and other persons of his group for the illegal encroachment over the government land as a result of which eviction proceedings were initiated and therefore, number of innocent persons were falsely implicated by the wife of the deceased and other family members. The Court below has also recorded a finding that acquitted accused persons were falsely implicated in the said offence due to factional rivalry. However, simply

because names of these accused persons were mentioned in the First Information Report and also on the basis of statement of PW-9 Sukhbai the appellants have been convicted. It is argued that PW-1 Beer Singh though not the eyewitness to the incident has made material improvement in his Court statement and claimed himself to be the eyewitness. Similarly Dharam Bai PW-2 has also claimed herself to be the eyewitness in her deposition though in her diary statement of Ex. D-2 it is not mentioned that she had seen the incident. If the statements of these two witnesses are discarded in that case solely on the basis of testimony of PW-9 Sukhbai, wife of the deceased who is highly interested witness, the accused persons have been roped in. He further argued that from perusal of the statements of other witnesses namely Dharambai (PW.2), Beer Singh (PW.1) and Ishwari Bai (PW.5), daughter of the deceased it is evident that immediately after the incident Dharambai and Ishwari Bai had gone to lodge the report in the police station and Sukhbai had also gone to lodge the report in the police station but their reports have been deliberately suppressed which throws serious doubt upon the prosecution case. It is further argued that on the basis of information given by Ramkhilawan (PW.7) Sanha of Ex.P/40 was recorded about the incident and death of Shankar Satnami and thereafter, Dehati Nalsi was recorded in the village itself. On the basis of Dehati Nalsi the crime was registered subsequently. However, report regarding registration of crime was not sent to the concerned judicial magistrate as per section 157 of the Cr.P.C. and for the aforesaid reasons Dehati Nalsi and the First Information Report lodged at the instance of PW-1 Beer Singh become doubtful. He further argued that except accused Sukhsagar rest of the accused persons have been convicted under section 302 with the aid of section 149 of the IPC.However, there is no evidence available on record regarding formation of unlawful assembly for the purpose of common object of killing Shankar Satnami

and therefore, solely on the basis of uncorroborated omnibus testimony of highly interested witness Sukhbai, the appellants could not be held guilty.

09. Learned counsel for the appellant has impugned the judgment of conviction on the ground that Sukhbai (PW-9) went to the police station to lodge the report and narrated the incident, however, the first information given by Sukhbai has been suppressed (vide paragraph-2 of her statement) and Dehati Nalishi of Ex.P/1 was recorded at about 16.30 hours on the date of incident and on the basis of Dehati Nalishi, Dehati Merg was also recorded and subsequently, the First Information Report of Ex.P/4 is shown to have been recorded in the police station in the evening. Both the information of the offence was received by the officer in-charge of the police station on the date of incident itself and the names of the accused persons were known to him. However, no report as contemplated under Section 157(1) of the Cr.P.C. was sent to the Magistrate who is empowered to take cognizance of such offence. In the admitted premises that the complainants and the accused persons were belonging to two rival factions of the village and the large number of the villagers of the rival parties have been arrayed as accused in the said offence, non-compliance of Section 157 (1) is a serious lacuna which impeaches the credibility of the First Information Report. Therefore, in these circumstances, the Court below was not justified in accepting the testimony of Sukhbai (PW-9), the alleged eyewitness who is wife of the deceased and though her statement has been disbelieved by the trial Court so far as allegations regarding accused Sukh Singh is concerned but the Court below ought to have disbelieved her statement in toto and extended the benefit of doubt to the accused persons.

10. It is further argued that the Court below has relied upon the statement of Sukhbai with a finding that her testimony is corroborated by the statement of

Beer Singh (PW-1), Ishwaribai (PW-5) and is also corroborated by the diary statements of Ramkhilawan (PW-7), Dhan Singh (PW-11) and Baburam (PW-6). It is contended that the testimony of Beer Singh (PW-1) and Ishwaribai (PW-5) have been discarded in toto on the ground that though they had not seen the incident but they claimed themselves to be the eyewitnesses of the incident. Similarly, the Court below has illegally held that the statement of Sukhbai (PW-9) is duly corroborated by the diary statements of the above three witnesses though these witnesses have not stated a word against the accused persons in their Court statements and they have been declared hostile and they have also denied their diary statements. Ramkhilawan (PW-7) gave the information of Ex.P/40 which was recorded in the Rojnamchasana and in that information also this witness did not name the accused persons.

11. Placing reliance on the judgment of the Hon'ble Supreme Court reported in **AIR 1993 S.C.400** in the matter of **Sarman Vs. State of M.P.**, it is argued that there is no evidence available on record to show that the accused persons formed unlawful assembly with an object to commit the murder of Shankar and therefore, the Court below has committed an illegality by convicting the accused/appellants No. 1 to 4 and 6 with the aid of Section 149 of the IPC. It is further argued that there is no specific allegations against the accused/appellants and the eyewitness Sukhbai has attributed the fatal blow on accused Sukhchand and Sukhsagar, however, the Court below has acquitted Sukhchand and convicted the other appellants including Sukhsagar. It is submitted that the names of the accused/appellant Ashwani and Aasan are not mentioned in Dehati Nalisi of Ex.P/1, Merg intimation of Ex.P/3 and F.I.R. of Ex.P/4, even then they have been convicted solely on the basis of testimony of Sukhbai (PW-9).

12. Further relying on the judgment of the Hon'ble Apex Court reported in **AIR 2003 S.C. 1783** in the matter of **State of Rajasthan Vs. Sheo Singh** it is submitted that the eyewitness is the wife of the deceased and there was enmity between the accused persons and her family and the first information given by Sukhbai (PW-9) has been deliberately suppressed and the report has been lodged after due deliberation and the same was not sent to the concerned Magistrate as per Section 157 of the Cr.P.C. Therefore, in the aforesaid circumstances the Court below ought not to have acted upon the sole testimony of the highly interested witness i.e. Sukhbai (PW-9).

13. On the other hand learned counsel for the respondent/State supported the impugned judgment of the trial Court and submitted that presence of Sukhbai at the time of incident is established. She has categorically deposed the involvement of the appellants in the crime in question. Her statement finds corroboration from the medical evidence. There are circumstantial evidence to the effect that in pursuance of the memorandums of the accused persons blood stained weapons of offence have been recovered and as many as sixteen injuries were found over various parts of the body of the deceased which could be caused by the weapons allegedly seized from the appellants as per opinion of the doctor. In the aforesaid circumstances the Court below has not committed any illegality in convicting and sentencing the appellants as mentioned above.

14. We have heard learned counsel for the parties and perused the material available on record, including the impugned judgment of the trial Court.

15. The learned Additional Sessions Judge has convicted the appellants by recording a finding as under;

1) That, Sukhbai (PW-9) is the sole eyewitness and her statement regarding presence of Shivlal, Sukhsagar, Hemkumar, Brijlal, Aasan and Ashwani, is corroborated by the statements of Ishwaribai (PW-5) and Beer Singh (PW-1). The diary statements of Ramkhilawan (PW-7), Dhan Singh (PW-11) and Baburam (PW-6) also corroborate the statement of Sukhbai regarding accused Shivlal, Hemkumar, Brijlal, Aasan and Ashwani.

2) That, on the basis of memorandum of the above accused persons weapons of offence were seized.

16. The statement of Sukhbai (PW-9) has been disbelieved in reference to the allegations against Sukh Singh on the ground that she has implicated the above accused out of animosity as he was in inimical terms with her husband and the village is faction ridden and the accused party had complained against the complainant party about their encroachment over the Government land whereupon they were evicted. The Court below has not relied upon the statements of Beer Singh and Dharambai though they have claimed themselves to be the eyewitnesses of the incident. It is also held that the Darshinbai(PW-8) is a hearsay witness.

17. The police proceeded for the scene of occurrence after recording the information given by Ramkhilawan (PW-7) in the daily diary of Ex.P/40. Thereafter, Dehati Nalisi of Ex.P/1 has been recorded on the basis of information given by Beer Singh (PW-1). The above information is based on the information given by Sukhbai (PW-9). It is also mentioned in Ex.P/1 that while Sukhbai was narrating the incident the accused persons namely Shivlal, Hemkumar, Sukhsagar, Khoman, Bhuwan, Brijlal, Ganga, Beeru, Durga, Mehataru, Bhoklu, Dwarika and Nandkumar armed with tabbal and lathi passed by his house and

went towards the field. On the basis of this information the offence has been registered. Beer Singh (PW-1) in his deposition has claimed himself to be the eyewitness of the incident and has stated that on the date of incident at about 11-12 O'clock he returned to his house and thereafter he went to the pond where he saw the *marpeet* and then returned to his house. He has also stated that Shankar was being assaulted by all the accused persons with Tabbal and lathi. After returning from pond when he was narrating the incident to his wife Sukhwantinbai, wife of Shankar named the accused persons Sukhchain, Shivlal, Brijlal, Aasan and Ashwani and at that time all the accused persons holding lathi and Tabbal went towards his diesel pump. Sukhbai told that Shankar has been murdered. He has further stated that Sukhbai, Dharambai and Ishwari had gone to lodge the report separately and I did not go to the police station personally and reported the matter to the police when the police came to the village.

18. PW-2 Dharambai has also claimed herself to be the eyewitness and has stated that she had seen the accused persons assaulting the deceased in the tank. When she returned to her home Ishwaribai, daughter of deceased Shankar stated that Shivlal etc. have murdered whereupon she informed that she knew about the incident and thereafter she along with Ishwaribai went to the police station Bemetara and narrated the incident in the police station. She has further stated that Khilawan also lodged the report which was recorded by the police and Sukhbai came at about 4-5 p.m. alone and lodged the report, however, her report was not recorded. Ishwaribai (PW-5), daughter of the deceased has stated that after the incident she along with Dharambai went to the police station after learning the incident from her mother Sukhbai and by the time they reached the police station Khilawan had already lodged the report. When Khilawan was lodging the report they had reached the police station and all the accused

persons whom she had named, were already named by Khilawan in his report. However, the police did not record her report. PW-9 Sukhbai has stated that she recognized all the accused persons. On the date of incident at about 12.00 noon she along with her husband and grand-son Alin were going to the pond for taking bath and she was going ahead and her husband was behind her. When they reached near the house of Tijwa, her husband was climbing embankment of the bank, at that time Shivlal, Sukhsagar, Hemkumar, Brijlal, Aasan, Ashwani, Sukhchand and Ganga, in all eight persons were standing at one place. Shivlal was holding Tabbal, Sukhsagar *Barchi,* Brijlal, Aasan, Ashwani, Sukhchand and Ganga were holding lathi. Sukhchand assaulted Shankar with lathi over his head and thereafter all the accused persons together started assaulting his husband, as a result of which her husband fell on the ground. He asked her to run away from there along with his grand-son but she remained there and saw Sukhsagar piercing the neck of her husband with *Barchi* and that Shivlal assaulted her husband with Tabbal over his head. Her husband died on the spot. Thereafter, she went to the house of Tijwa and from there she went to her own house and narrated the incident to her daughter Ishwaribai. From there she went to the house of Beer Singh (PW-1) and narrated the incident to him whereupon Beer Singh informed her that he has also seen the above incident. At that time accused persons holding bloodstained Tabbal, Barchi and lathi were running towards the field. She asked Beer Singh to accompany her for lodging the report, however, he declined and told that they would also kill him. Thereafter, she went to village Kchitapar and from there to Penditarai and from Penditari she went to Bemetara by bus and reached Bemetara police station in the evening. She found that Dharambai and Ishwaribai were also in the police station. They informed that police people had gone to village Dara in a vehicle. When she was weeping, the Sr. Officer called her and asked whereupon she narrated the

incident to him and thereafter she was taken to village Dara with Ishwari and Dharam in a Jeep.

19. From the statements of the above witnesses it appears that immediately after the incident Ramkhilawan, Dharambai, Ishwaribai and lastly Sukhbai went to the police station to lodge the report. It also transpires that when Ramkhilawan was lodging the report Ishwaribai and Dharambai were already present in the police station. However, there is no explanation available on record as to why a detailed F.I.R. was not recorded on the basis of information given by the above witnesses and a cryptic information was recorded in the daily diary regarding arson and murder of Shankar. We also note that on the basis of material available on record the Court below has recorded a finding that no information as per Section 157(1) of the Cr.P.C. has been sent in the instant case to the concerned Magistrate and a detailed report has been recorded only in the Dehati merg intimation of Ex.P/1.

20. The Hon'ble Apex Court in the matter of **Ravi Kumar Vs. State of Punjab** reported in **(2005) 9 SCC 315** while dealing with delay in sending the report under Section 157(1) of the Cr.P.C., has held that "*sending the copy of the special report to the Magistrate as required under Section 157 of the CrPC is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the court on guard to find out as to whether the version as stated in the court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in Section 157 CrPC is the mandate of law. Delay wherever found is required to be explained by the*

prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not.

21. In the instant case, admittedly the prosecution has failed to prove that information as mandated under Section 157(1) of the Cr.P.C. was sent to the concerned Magistrate. We have already noted above that from the evidence available on record four persons had immediately gone to the police station to lodge report but no F.I.R. was registered on their report and in the above circumstances we propose to minutely examine the statements of Sukhbai (PW-9) and other witnesses.

22. We have already observed above that Dehati Nalisi naming 13 persons was recorded on the basis of information given by Beer Sing in the village itself. In this information the names of appellant Ashwani and Aasan are missing. The report was lodged by Beer Singh on the basis of information given by Sukhbai. We also find that Dehati Nalisi contained the name of all the all the 13 accused persons whereas Sukhbai in her diary statement of Ex.D/5 has named Shivlal, Sukhchand, Hemkumar, Sukhsagar, Ashwani, Aasan and Brijlal, as perpetrator of the crime. She has also stated that the incident was witnessed by Mulchand, Khilawan, Dhan Singh and Baburam. None of the independent witnesses has supported the case of the prosecution. However, in her statement before the Court she had aided the name of Ganga. She had not made any specific allegations against appellants Hemkumar, Brijlal, Aasan and Ashwani, though she has stated that Sukhchand opened the assault by lathi and she lodged the report stating that all the accused persons started assaulting together whereupon her husband fell on the ground and thereafter he was assaulted by Sukhsagar by

Barchi over his neck and by Shivlal with Tabbal over his head. PW-1 Beer Singh, Pw-2 Dharambai and PW-5 Ishwaribai, are not the eyewitnesses according to the case of the prosecution. However, PW-1 and PW-2 have claimed themselves to be the eyewitnesses and therefore, the Court below has rightly disbelieved the account given by these two witnesses.

23. Thus the evidence on which the conviction is based is the memorandum of the accused persons and the recovery of weapons of offence on their memorandum. We find from the evidence on record that only one witness namely Sitaram (PW-10), the witness of memorandum and recovery has been examined and he has stated in his cross examination that he was summoned by the police near the tank and from there the dead body was taken to the school and his signature was obtained on various papers for two days in the school at a time. He has also admitted that he had encroached upon the Government land which was grazed by the villagers and therefore, we are of the considered opinion that the evidence of memorandum of the accused persons and recovery of the weapon of offence in pursuance of the said memorandum, does not inspire confidence. Even otherwise, there is no evidence available on record to establish that the seized weapons contained human blood.

24. On the basis of aforesaid discussion, we are of the considered opinion that looking to the evidence available on record against appellant No. 1 Shivlal and appellant No. 5 Sukhsagar, particularly the statement of Sukhbai (PW.9), no interference is called for in the impugned judgment of the trial Court against their conviction. Accordingly, the appeal so far as it relates to appellants No. 1 and 5, the same being devoid of merits is liable to be dismissed and is hereby dismissed.

25. However, considering the totality of the facts and circumstances of the case, the statements of witnesses particularly the statement of PW-9 Sukhbai, we are of the considered opinion that it would not be safe to convict appellant No. 4 Ashwani and appellant No. 6 Aasan against whom only general and omnibus allegations have been made by PW-9 and whose names do not find place in the documents of Ex.P/1, Ex.P/3 and Ex.P/4. Similarly, considering the facts and circumstances of the case and the evidence available on record against appellants No. 2 and 3 we find that there is no specific allegations against appellants No. 2 and 3 also except that they were present at the time of incident along with other persons and all of them started assaulting the deceased.

26. Thus, taking into consideration the view taken by the Hon'ble Apex Court in the matters of Sarman Vs. State of M.P and State of Rajasthan Vs. Sheo Singh (supra), we extend the benefit of doubt to appellant No. 2 Hemkumar, appellant No. 3 Brajlal, appellant No.4 Ashiwani and appellant No. 6 Aasan, allow their appeal and set aside their conviction under Sections 148 and 302/149 of the IPC and order of sentence passed by the learned Additional sessions Judge. Accordingly, appellants No. 2, 3, 4 and 6 are acquitted of all the charges leveled against them and they are directed to be set at liberty forthwith if not required to be detained in connection with any other offence.

Sd/-
Dhirendra Mishra
Judge

Sd/-
Satish K. Agnihotri
Judge